IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 357 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMARNATH MURLIDHAR YADAV

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 357 of 2002

MR HARSHIT S TOLIA for Petitioner No. 1

MR PR ABICHANDANI, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 23/09/2002

ORAL JUDGEMENT

1. The appellant came to be convicted by Special Court (NDPS), Rajkot, for offences punishable under Section 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/-, in default, to undergo rigorous imprisonment for six months for offence punishable under Section 20(b) and also sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/-, in default, to undergo rigorous

imprisonment for six months for offence punishable under Section 29 of the NDPS Act. The appellant was accused No.1 before the Trial Court. His co-accused, Gitaben, wife of Laljibhai Vashrambhai Sitapara also came to be convicted by the Trial Court for offence punishable under Section 20 read with Section 29 of the NDPS Act and was ordered to undergo rigorous imprisonment for a period of eight months and to pay a fine of Rs.1000/-, in default, to undergo simple imprisonment for one month, with a direct to give an undertaking under Section 34 of the NDPS Act that she will refrain from indulging in any criminal activity or activities stated under the NDPS Act. The said judgment was rendered on the 22nd January, 2002.

2. When the appeal was placed for admission, this Court, while admitting the same, had ordered it to be expedited and the statement of learned Advocate for the appellant was recorded that he shall furnish the paper book. Accordingly, paper book is furnished by the learned advocate for the appellant.

3. The brief facts of the case are that, P.S.I.-V.M. Gohil working with Rajkot City "B" Division Police Station received an information that Gitaben Laljibhai Koli is waiting for Amarnath Bhaiyaji, at Majotinagar, near Rizvi Pan House on the highway with a quantity of ganja in a rexine bag. The said information was noted down by the Officer in the Station Diary and higher officer was informed. Panchas were summoned and a preliminary Panchnama was drawn at the Police Station. Thereafter, the Panch along with other members of the raiding party went to Rizvi Pan House on the highway, where a person whose description was given by the informant was found to be sitting. After some time, at about 14.20 hours, a lady came there with a rexine bag and talked to that person and gave that bag to the said person. They were, therefore, accosted, requisite procedure as prescribed under Section 50 of the NDPS Act was followed and search was conducted. In search, leaves, branches and seeds like materials were found from the rexine bag in a plastic bag. It was found that the contents was ganja. As the persons apprehended did not possess any pass, permit or licence to keep the narcotic drug-ganja, a complaint was lodged against them under Section 20 and 29 of the NDPS Act, a Panchnama was drawn and muddamal was seized after weighment and sealing. The muddamal was found to weigh 1.750 kgs., which was put into a packet, a slip signed by Panch witnesses was put into the packet and, thereafter, seal of the police was applied. It was sent for analysis to Forensic Science

Laboratory (FSL) and the FSL report says that the material seized was ganja. A charge sheet was, therefore, filed. When the charge was framed at Ex.2, the accused persons pleaded not guilty to the charge and claimed to be tried. Considering the evidence led by the prosecution, the Trial Court came to a conclusion that the prosecution was successful in establishing the charges and, therefore, recorded the conviction and awarded the sentence as stated above. Aggrieved by the said judgment and order, present appeal is preferred.

4. Learned Advocate, Mr. Tolia, appearing for the appellant has raised two contentions, as stated below:-

(1) That the sealing procedure at the time of seizure is defective and would render the entire investigation to doubt. He submitted that, at the time of seizure, the investigating agency has put the slip containing signatures of the Panch witnesses into the container and, thereafter, seal of the police was applied which can be easily tampered with by police without any damage to the slip containing signatures of the Panch witnesses. This has been disapproved by this Court in the case of Jitendra alias Sanjaykumar Suryakant Desai v. State of Gujarat (Criminal Appeal No.323 of 1996) by judgment dated August 17, 2001. Mr. Tolia, therefore, submitted that the two defects in the prosecution case ought to have resulted into an acquittal of the accused. He, therefore, urged that this appeal may be allowed.

(2) The evidence indicates that the contraband certified to be ganja is, in fact, not ganja in light of the evidence on record.

5. Learned Additional Public Prosecutor, Mr. Abichandani, opposes this appeal. According to him, the material which was seized from the appellant is tested and certified by an independent agency like FSL to be ganja and, therefore, admission on part of the witnesses who are laymen may not be given undue weightage. Mr. Abichandani submitted that the Investigating Officer as well as the Panch witnesses has in terms stated how the sealing was done and, therefore, is no reason to doubt their version. He, therefore, urged that the appeal may be dismissed.

6. Having regard to rival side contentions, this

Court is required to consider only two aspects, namely, whether the sealing procedure adopted by the investigating agency can be said to be proper and whether the material alleged to have been seized from the appellant was, in fact, contraband ganja, as defined under the NDPS Act.

7. So far as the sealing part is concerned, there is no dispute about the fact that when the material was seized, it was placed into a packet. Slip containing signatures of the Panch witnesses was put into the packet and, thereafter, it was wrapped and seal was applied. The sample was then handed over to the Police Station Officer, who, in turn, sent it to the FSL for analysis. It has to be noted that, so far as the procedural part at the time of seizure, as stated above, is concerned, there is no dispute between the parties. What could be the possible consequence of this procedure has also been brought on record during deposition of the Investigating Officer. A suggestion is put to him that when only seal is applied on the top of the packet containing the sample with the slip inside the packet, the seal can be broken and re-applied by the police, which of course he has denied. But it has to be visualized that, if the slip containing signatures of the Panch witnesses is kept inside the packet containing the samples with only a seal of the police outside the packet and if the sample remains in custody of the police without any independent surveillance of the Panch witnesses or others, the possibility of the seal being broken open and re-applied cannot be ruled out. It may not have happened or it may not happen is different than there being a possibility of the seal being broken and re-applied by the investigating agency. The purpose behind seizing the material in presence of Panch would be frustrated. These aspects were considered by this Court in the case of Jitendra alias Sanjaykumar Suryakant Desai v. State of Gujarat (supra) relied upon by Mr. Tolia. In that decision, in paragraph 5, it is observed thus:-

> "....There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well

> as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done here, as discussed earlier, the possibility of tampering cannot be ruled out. Under the circumstances, the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tampering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused."

In light of the above observation of this Court, in the instant case, the sealing procedure at the time of seizure, being defective and not above the shadow of doubt, the benefit has to go to the accused. The appeal has to be accepted.

8. Mr. Tolia, in light of above observations, does not press for a verdict on the second contention.

9. The appeal, therefore, deserves to be allowed and the same is allowed. The judgment and order of conviction and sentence dated 22.01.2002, passed by the learned Special Judge, Rajkot, in Special Case No.7 of 2001, is hereby set aside. The appellant be released forthwith, if not required in any other case. Fine, if paid, be refunded.

[A.L. DAVE, J.]

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